

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen;)	CIVIL NO. CV03-00385 SOM-LEK
)	(Copyright)
Plaintiff,)	
vs.)	DECLARATION OF LEX R. SMITH
)	
HAWAIIAN EXPRESS SERVICE,)	
INC., et al.,)	
)	
Defendants.)	
)	
)	
)	

400927.v1

DECLARATION OF LEX R. SMITH

1. I am an attorney licensed to practice law before all of the State and Federal Courts in the State of Hawaii and am one of the attorneys representing Defendant POST-CONFIRMATION TRUST for Fleming Companies, Inc. ("PCT") in this case.

2. Attached hereto as Exhibit "A" are pages from the Deposition of Mark Dillon taken on March 25, 2002 in Berry v. Fleming, CIVIL NO. CV 01 00446 SPK LEK. Mr. Hogan was asking the questions and Mr. Berry was in attendance.

3. Attached hereto as Exhibit "B" are pages from the trial transcript in Berry v. Fleming, CIVIL NO. CV 01 00446 SPK LEK from the

testimony of Ralph Stussi responding to questioning by Timothy Hogan, Esq.

4. In March of 2003, following the verdict in Berry v. Fleming, CIVIL NO. CV 01 00446 SPK LEK, I moved for attorneys' on behalf of Fleming Companies Inc. as the prevailing party because (1) the verdict was 1/37,000th of the amount the plaintiff claimed he would recover at trial; (2) immediately before trial, the plaintiff rejected an offer (calling it "peanuts") that was twice as much the verdict he ultimately recovered; and (3) the plaintiff lost on two of the three works, and 5 of the 6 claims the plaintiff took to trial. My bills from that case were attached to the motion and served on Mr. Hogan in March of 2003. Copies of some of those bills that I served on Mr. Hogan over three years ago, in March of 2003 are attached to the present motion.

5. Attached hereto as Exhibit "C" is a true and correct copy of the Court's Order dated October 21, 2005.

6. Attached hereto as Exhibit "D" are copies of pages 88-91 from the trial transcript in this case reflecting testimony of Brian Christensen in response to questioning from Timothy Hogan Esq. on March 1, 2006.

7. In December of 2004, I was present at the deposition of Brian Christensen in this case when he testified that he became Hawaii Division

President in March of 2003. I did not recall that thirty-two months earlier (in March of 2002) Tim Hogan, Wayne Berry and I were all present at a deposition in which Mr. Mark Dillon testified that Brian Christensen was the boss at Fleming's Kapolei offices. Apparently Mr. Hogan and Mr. Berry also did not recall Mr. Dillon's testimony.

8. I also did not recall that the bills which I produced to Mr. Hogan in 2003 reflected that they were addressed to Brian Christensen beginning in 2002. Apparently Mr. Hogan also forgot this fact.

9. To the best of my recollection, I had very little contact with Mr. Christensen regarding the first Wayne Berry copyright lawsuit, Berry v. Fleming, CIVIL NO. CV 01 00446 SPK LEK. My contacts at Fleming for dealing with the case that went to trial in 2003 were Ralph Stussi and Fleming lawyers in Oklahoma City and Houston Texas. Ralph Stussi attended the trial in March of 2003 as Fleming's representative.

10. Attached hereto as Exhibit "E" is a true and correct copy of pages 88-89 of the 03/01/06 trial transcript in this case.

11. Attached hereto as Exhibit "F" is a true and correct copy of the 03/02/06 trial transcript in this case.

12. Attached hereto as Exhibit "G" is a true and correct copy of trial exhibit 201.

13. Attached hereto as Exhibit "H" is a true and correct copy of trial exhibits 202-207.

14. Attached hereto as Exhibit "I" is a true and correct copy of an email from Timothy Hogan, Esq. dated 03/02/06.

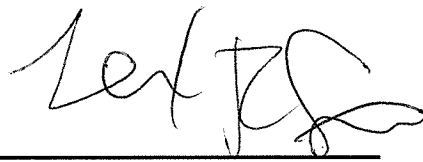
15. Attached hereto as Exhibit "J" is a true and correct copy of trial exhibit 14.

16. Attached hereto as Exhibit "K" is a true and correct copy of trial exhibit 26.

17. Attached hereto as Exhibit "L" is a true and correct copy of trial exhibit 103.

18. Attached hereto as Exhibit "M" is a true and correct copy of trial exhibit 66.

DATED: Honolulu, Hawaii, May 18, 2006.

A handwritten signature in black ink, appearing to read 'Lex R. Smith', written over a horizontal line.

LEX R. SMITH